COURT OF APPEALS
DECISION
DATED AND FILED

May 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1336 **Cir. Ct. No. 2010CV5368**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STEPHEN FISCHER AND JOHN FISCHER,

PLAINTIFFS-APPELLANTS,

V.

JAMES E. RENNER AND JAMES AND SUSAN RENNER LIVING TRUST, DATED OCTOBER 30, 2003,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 NEUBAUER, P.J. We affirm the circuit court's grant of summary judgment in favor of a guarantor of business debt who was sued by investors in the business after the business went under. The investors claimed unjust enrichment

because they had provided a cash infusion to the business that incidentally conferred a benefit on the guarantor by relieving him of his duty to pay off debt when the business failed. Even liberally construing the concept of a benefit conferred so as to include the alleged benefit here, there are no facts to show that the result was unjust. Due to their respective interests, the cash investors paid first on the debt load. This alone does not allow the cash investors to look to the guarantor to recoup their losses under an unjust enrichment theory. We affirm.

BACKGROUND

¶2 This case is about an investment in a car dealership business that failed. James Renner transferred ownership in his Mitsubishi dealership to his sons Joseph Renner II and Thomas Renner in 2002 and 2003. Joseph and Thomas also bought a second dealership—the Kia dealership—in 2003. James was a personal guarantor of the operations line of credit of the Mitsubishi dealership with Mitsubishi Motors Credit. The James and Susan Renner Living Trust (sometimes referred to collectively with James Renner as "James") pledged real property as security for the business lines of credit with Ridgestone Bank.

¶3 In March 2006, Stephen and John Fischer, along with Joseph and Thomas, formed Car Guys LLC, which was created as an umbrella ownership entity of Renner Imports, Inc. (the Mitsubishi dealership) and Renner Automotive LLC (the Kia dealership). The Fischers bought into Car Guys, investing $528,937.50 for a 44.681 percent interest. As part of that transaction, the Fischers took on liability for their pro rata share of Car Guys' debt.

¶4 In May 2007, creditors seized the assets of Car Guys, thus shutting down the dealerships, due to defaults on loans. In early 2008, Ridgestone Bank obtained a judgment against Car Guys and Joseph and Thomas for $1,614,022.22.

Business assets and personal assets of Joseph and Thomas were liquidated to satisfy the judgment.

¶5 In 2009, the Fischers sued Joseph and Thomas for fraud, alleging that Joseph and Thomas had misrepresented the financial health of the dealerships in order to induce the Fischers to invest in Car Guys. The Fischers settled with Joseph and Thomas for a total of $390,000 and executed a general release. The Fischers threatened to include James in this fraud suit, but did not.

¶6 In late 2010, the Fischers sued James, alleging unjust enrichment. The Fischers' theory depended on James's personal guarantee of certain Car Guys' debt and the Trust's pledge of certain real estate as security on certain Car Guys' debt. The Fischers claimed that when the dealerships failed financially, corporate assets were used to pay debt and because of this James did not have to pay the debt, which benefited him by $528,937.50, the amount invested by the Fischers. Retention of this benefit is unjust, the Fischers urged, because the debts were obligations of James, not the Fischers.

¶7 The circuit court granted summary judgment to James, reasoning that: (1) the Fischers released James when they released Joseph and Thomas; (2) James was a necessary party to, and not included in, the lawsuit against Joseph and Thomas; and (3) James did not unjustly retain any benefit from the Fischers. This appeal follows. We affirm. As the circuit court aptly put it, "unjust enrichment cannot be found from this set of facts because of the remoteness, the separation, the organizational and legal barriers involved." Additional facts are discussed as necessary.

DISCUSSION

Standard of Review

¶8 We review a motion for summary judgment de novo, using the same methodology as the circuit court. ***Yahnke v. Carson***, 2000 WI 74, ¶10, 236 Wis. 2d 257, 613 N.W.2d 102. Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). The purpose of summary judgment is to determine whether there exist any material facts in dispute and thus avoid a trial when there is nothing to try. ***Yahnke***, 236 Wis. 2d 257, ¶10.

Unjust Enrichment

¶9 To establish a claim for unjust enrichment, the plaintiff must prove three elements: (1) the plaintiff conferred a benefit upon the defendant; (2) the defendant knew of the benefit; and (3) the defendant retained the benefit, and it was inequitable for the defendant to do so without payment. ***Puttkammer v. Minth***, 83 Wis. 2d 686, 689, 266 N.W.2d 361 (1978). Unjust enrichment is an equitable doctrine, a "broad and flexible remedy." 66 AM. JUR. 2D *Restitution and Implied Contracts* § 2 (2011).

¶10 The Fischers contend that there are material facts in dispute requiring a trial. They point to their allegations that James was aware of the financial troubles of the dealerships and the desire for new investors. They argue that whether the benefit to James was unjust "by its very nature, is a question of fact and inappropriate for summary judgment since it requires a weighing of the

facts by the trier of fact to determine the right thing to do (weighing the 'equities')." We disagree. The Fischers were investors in a business venture that had some debt guaranteed by James. There is nothing unusual about this business scenario. This investor/guarantor circumstance does not provide the basis for an unjust enrichment claim between two parties with no contractual relationship and no facts to show that a benefit was unjustly conferred.

¶11 To shed light on the application of unjust enrichment, we first look to ***Puttkammer***, in which a contractor sued the owner of a supper club after making improvements to the building pursuant to a contract with the lessee of the club. ***Puttkammer***, 83 Wis. 2d at 687-88. As our supreme court explained

> Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor ….

Id. at 690 (quoting RESTATMENT OF RESTITUTION § 1 cmt. c (1937)). Regarding the improvements to the supper club, the court held that the owner's knowledge of or acquiescence in the performance of the work did not make the owner liable for the cost. ***Id.*** at 693. "The unjust enrichment or restitution claim is asserted by one who did the work, and produced an incidental gain to the owner, by merely performing his contract with another and is now dissatisfied because the return promised under the contract is not forthcoming." ***Id.***

¶12 In ***United States v. Goforth***, 465 F.3d 730 (6th Cir. 2006), there was no recovery for the government under unjust enrichment when a widow's loans to her late husband's defunct company were repaid while the government's judgment against the company remained unsatisfied. ***Id.*** at 732-33. Sheila Gilley had

loaned her husband's home health care company money and put up a certificate of deposit as collateral for a loan to the company. ***Id.*** at 732. When the company's assets were sold, the bank loan was paid off, the bank released Gilley's CD to her, and her loan was repaid. ***Id.*** at 732-33. The government claimed that Gilley had been unjustly enriched, because these assets should have been used to satisfy the government's judgment against the company for misuse of Medicare reimbursement funds. ***Id.*** at 732. The Sixth Circuit Court of Appeals held that the government did not have an unjust enrichment case against Gilley because "the government conferred no benefit, directly or indirectly, on Sheila Gilley." ***Id.*** at 734.

> It is undisputed that the CD was at all times Sheila Gilley's property and, upon repayment of the South Holland Bank loan, the encumbrance incurred through its collateralization was simply released. Sheila Gilley was left with nothing more than what she owned in the first place.…
>
> In analogous circumstances, courts have found that the theory of unjust enrichment may not be used to allow a stranger to a loan contract or promissory note to seek funds repaid pursuant to such an agreement.

Id. The court went on to discuss an unpublished Seventh Circuit case involving two entities that issued performance bonds to a construction company. ***Id.*** The company used funds from one to repay creditors on other projects that were bonded by the other. ***Id.*** at 734-35. The unpaid bond issuer did not have a case for unjust enrichment against the other bond issuer.

> [B]ecause the defendants' "benefit"—not having to perform on their bonds—was a consequence of the repayments to creditors that the construction company was contractually required to make, such benefit was not unjust and did not violate "fundamental principles of justice, equity, and good conscience."

Id. at 735 (citing ***National Am. Ins. Co. v. Indiana Lumbermens Mut. Ins. Co.***, No. 99-2637, 2000 WL 975176 (7th Cir. July 11, 2000)).

¶13 The Fischers did not confer an unjust benefit on James when they invested money in Car Guys, money that ultimately eased James's obligations as guarantor on dealership debt. The Fischers invested in Car Guys, and Car Guys was contractually liable for the dealerships' debt. James guaranteed the dealerships' debt. James promised to pay if the dealerships could not. A guarantor's obligation is secondary to that of the primary debtor. ***Continental Bank & Trust Co. v. Akwa***, 58 Wis. 2d 376, 388, 206 N.W.2d 174 (1973). The guarantor promises to pay if the primary debtor cannot. ***Id.*** Similarly, one who pledges property as security, as the Trust did, does so "in order to assure the payment … of … debt, by furnishing the creditor with a resource to be used in case of failure in the principal obligation." BLACK'S LAW DICTIONARY 1355 (6th ed. 1990). "Where the obligors' respective duties coincide in such a way that performance by the claimant obviates the need for performance by the defendant, but without permitting the conclusion that—inter se—the liability in question is primarily the responsibility of the defendant, restitution will be denied." RESTATEMENT OF RESTITUTION AND UNJUST ENRICHMENT § 24 cmt. g at 356-57 (2011).

¶14 Here, the arrangement involves the contractual obligations of investors vis-à-vis an unrelated guarantor. There is nothing about their respective contractual obligations for the company's debt that is inherently unjust or unfair. While the Fishers' cash infusion that was used to pay the company's primary debt obligations may have resulted in an incidental benefit to the secondary obligor, that outcome was contractually established.

¶15 To the extent that the Fischers' contractual obligations were fraudulently obtained, the only identified wrongdoers are Thomas and Joseph, from whom they have recovered. There are no facts to show that James made any misrepresentations or otherwise induced the Fischers to invest in Car Guys; indeed, there are no facts to show that the Fischers had any communications with James. And, there are no facts to show that James had knowledge of any of the alleged wrongful conduct of Joseph or Thomas. At the time of the Fischers' investment, James was not an owner of Car Guys or the car dealerships, and he received none of the money the Fischers invested in Car Guys. And, ultimately, James's knowledge of the benefit as a result of the Fischers' investment is immaterial. Knowledge of, and acquiescence in, the benefit conferred is only one element of unjust enrichment. ***Puttkammer***, 83 Wis. 2d at 689. The mere fact that there may have been incidental benefit to James, and that James may have known about it, does not require James as a guarantor to make restitution to the investors of Car Guys; the incidental benefit does not violate fundamental principles of justice, equity, and good conscience.

¶16 Finally, we briefly note that the Fischers' attempt to liken this to two innocent parties, the latter a holder of stolen goods, is wholly inapt. The Fischers point to no case where the stolen goods analogy applies when, as here, the parties' financial obligations regarding the money at issue are contractually defined.

¶17 The Fischers' attempt to hold James liable for their investment loss fails as a matter of law. Unjust enrichment does not operate to make a third party the insurer of a failed business venture. *See* ***id.*** at 693. Under the facts submitted on summary judgment, there is nothing unfair about any incidental benefit conferred on James by the Fischers' investment in Car Guys. James is entitled to judgment as a matter of law. *See* ***Transportation Ins. Co. v. Hunzinger Constr.***

Co., 179 Wis. 2d 281, 291-92, 507 N.W.2d 136 (Ct. App. 1993) (citing ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322-23 (1986)) (moving party is entitled to judgment as a matter of law when nonmoving party fails to make a sufficient showing on an essential element of his or her case with respect to which he or she has the burden of proof).[1]

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[1] We need not address the Fischers' alternative arguments regarding the bases for the circuit court's decision because we have concluded that, as a matter of law, the Fischers have failed to present a viable case for unjust enrichment. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).